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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 185

BEDFORD NUGENT CORPORATION, AN INDIANA CORPORATION,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Bedford-Nugent Corporation, an Indiana corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit entered on March 3, 1966, is reported in ..... F. 2d ..... (CCA 7 1966); 53 LC 11,089 and appears at Appendix A, pages 19 to 26 attached to this petition. The judgment, along with the findings of fact and conclusions of law of the District Court entered on July 7, 1965, appears at Appendix B, pages 27 to 30.

QUESTION PRESENTED.

Whether picketing and other activity of a labor organization which fall within Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, as amended, and is directed at customers and employees of customers of a primary employer is, nevertheless, protected primary activity under the proviso to subsection (B) of Section 8(b)(4), if conducted at the primary situs of the labor dispute.

JURISDICTION.

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254(1).

STATUTE INVOLVED.

Section 8(b)(4) of the National Labor Relations Act, as amended, Title 29 U. S. C. Section 158(b)(4), insofar as here pertinent, provides as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .
>
> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or

otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of section 159 of this title. *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Section 303 of the Labor Management Relations Act, as amended, Title 29 U. S. C. Section 187, provides as follows:

"(a) It shall be unlawful for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit."

STATEMENT.

At all times material hereto Petitioner was engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Petitioner's operations were conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Respondent Union, which was not the certified bargaining representative of Petitioner's employees, picketed the Petitioner's premises at each of the locations during the period of September 26, 1961, through November 7, 1961. This picketing was joined in by some of Petitioner's employees who were members of the Union. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included 1) the placing of nails and tacks at the entranceways to Petitioner's premises, 2) the shooting of an air pistol at the radiators and windshields of approaching customers, 3) the blocking of entranceways by pickets who refused to stand aside, and 4) the threatening of physical injury and property damage to customers who attempted to enter or did enter Petitioner's premises. The aforesaid activities of Respondent Union had the effect of deterring a substantial number of customers from entering Petitioner's premises. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle Petitioner's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of the activities was to force such customers to cease doing business with Petitioner and to force Petitioner to recognize the Union as the representative of Petitioner's employees.

Petitioner brought this action in the District Court under

the provisions of Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. Section 187, to recover damages from the Respondent Union. The damages were alleged to have been occasioned by the aforesaid activities of the Union claimed to be an unfair labor practice under the provisions of Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. A. Section 158(b)(4). The case was heard by the Court without a jury. The Court made and entered findings of fact and conclusions of law. Based on the facts found, the Court concluded that although the activity of the Union clearly fell within clauses (i) and (ii) of Section 8(b)(4) such activity was, nevertheless, excluded from the unfair labor practices defined by that section because it was within the protected area of primary picketing carved out in the proviso to subsection (B) of Section 8(b)(4). The Court bottomed its decision on *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, 84 S. Ct. 899 (1964). A judgment order dismissing the action was entered and the Petitioner appealed to the Seventh Circuit Court of Appeals. On appeal, the judgment order was affirmed.

REASON FOR GRANTING THE WRIT.

An Important Question of Federal Law Has Been Decided By a Circuit Court of Appeals Which Has Not Been, But Should Be, Settled by This Court; or Which Has Been Decided in a Way Probably in Conflict With Applicable Decisions of This Court.

It is Petitioner's position that its petition for a writ should be granted because of the importance of the Federal question presented herein, to-wit; whether a labor union, not certified as the bargaining representative of a primary employer's employees, may engage in activities proscribed by Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, and aimed directly at customers of the primary employer attempting to enter the primary employer's premises, and yet be protected under the proviso to Subsection B.

The majority opinion of the Court of Appeals in the present case correctly stated that the factual findings of the District Court are undisputed. As stated in the opinion, these findings are as follows:

> "Plaintiff (Petitioner here) is engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Its operations are conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Union, which was not the certified bargaining representative of Plaintiff's employees, picketed the Plaintiff's premises at each of the three locations during the period of September 26, 1961, through November 7, 1961, and some of Plaintiff's employees who were members of the Union joined in the picketing. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included

the placing of nails and tacks at the entranceways to Plaintiff's premises, the shooting of an air pistol at the radiators and windshields of vehicles of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical injury and property damage to customers who attempted to enter or did enter Plaintiff's premises. Although the Union activities did not stop all customers from entering Plaintiff's premises, it did have the affect of deterring a substantial number. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle Plaintiff's goods or materials, or to perform any services, or in order to threaten, coerce or restrain Plaintiff's customers. The object of the activities was to force such customers to cease doing business with Plaintiff and to force Plaintiff to recognize the Union as the representative of Plaintiff's employees." Appendix A, page 21.

As can be seen from the above findings of fact, the Court of Appeals agreed with the District Court that the activities of Respondent Union were within the proscription of Section 8(b) (4) (i) and (ii),

"to . . . induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, . . . a refusal in the course of his employment to use, . . ., transport, or otherwise handle, or work on any goods, . . ., or materials, or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce. . .".

Likewise, it was found that the activities of Respondent Union had the object, illegal under Subsection (B) of Section 8(b) (4), of

"forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manu-

> facturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees, unless such labor organization has been certified as the representative of such employees. . .".

However, both the District Court and the Court of Appeals held that Respondent's activities, though clearly within the provisions of 8(b) (4) (i) and (ii) and engaged in for the objectives covered by Subsection (B) are protected by the proviso thereto. *United Steelworkers of America* v. *National Labor Relations Board,* 376 U. S. 492 (1964), was regarded as controlling. Petitioner contends that the *Steelworkers* case and *Electrical Workers Local No. 761* v. *NLRB* (the *General Electric* case), 366 U. S. 667, which latter case was the foundation for the *Steelworkers* decision, are distinguishable from the case at bar and should not control. Petitioner's primary argument in support of this contention is that the inducements, threats, coercion and restraint complained of were not directed at employees "furnishing day-to-day services" for the primary employer, as in *Steelworkers* and *General Electric,* but were directed at Petitioner's customers and employees of customers attempting to purchase goods and materials for their own use. Petitioner also urges that the confinement by Respondent of its activities to Petitioner's premises is not the all conclusive factor, as held by the courts below, in whether such activities are prohibited secondary activities or protected primary activities. The location of the picketing and other activities is an important but not decisive factor. More important is the question of whether such activities were intended to force or require Petitioner's customers to cease doing business with Petitioner.

It Is an Unfair Labor Practice for a Labor Organization to Engage in the Activities Proscribed by Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, for the Purposes Set Forth in Subsection (B) Thereof, and Directed at Customers of a Primary Employer, Who Do Not Furnish Day-to-Day Services Essential to the Primary Employer's Regular Operations.

Petitioner contends that the activities of Respondent Union in inducing, threatening, coercing and restraining Petitioner's customers for the object of forcing such customers to cease doing business with Petitioner and to force Petitioner to recognize Respondent as the representative of Petitioner's employees are not excluded from Section 8(b) (4) (i) and (ii) by the proviso thereto. As contended by Petitioner, the activities complained of are not within the ambit of the holdings in the *Steelworkers* and *General Electric* cases because they were not directed at employees "furnishing day-to-day services" for the primary employer.

The *Steelworkers* case involved picketing at an entrance used exclusively by railroad personnel, to a railroad spur located on a right-of-way owned by the railroad and adjacent to the premises of the primary employer, Carrier Corporation. The picketing activity began when employees of the railroad moved empty boxcars through the gate for future use by Carrier and became intensified after the switching engine picked up loaded boxcars which Carrier wanted shipped out and attempted to move these cars back out through the gate.

In reversing the decision of the Court of Appeals for the Second Circuit, the Supreme Court held that:

> "... Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations." 376 U. S. 499.

The Court of Appeals in the present case, after quoting the above-cited language from the *Steelworkers* decision, concluded that:

> "Customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission 'contributing to the operations' of the primary employer." Appendix A, page 23.

The rationale for this conclusion was that:

> "Customers are essential to the continued operation of the Plaintiff's (Petitioner's) business. To deter them from entering the Plaintiff's premises is certainly an application of economic pressure at the primary situs." Appendix A, page 23.

Petitioner agrees that customers and employees of customers are indeed neutrals in a labor dispute between the primary employer and a labor organization; however, the classification of customers as "contributing to the operation of the primary employer" is an improper extension of the holding in the *Steelworkers* case. It is indeed fallacious reasoning to say that customers contribute to the operations of a primary employer simply because they are "essential to the continued operation of the primary employer's business." Petitioner's customers approached the picket line at Petitioner's places of business for the purpose of making purchases from Petitioner for their own use, and not to make deliveries to, or perform services for, the primary employer. To show how unfounded is the reasoning of the Court of Appeals, Petitioner would point out that in numerous cases the Board and the Courts have held inducements, threats, and coercion aimed at employees performing construction work on the premises of a primary employer to be 8 (b) (4) violations. *United Brick and Clay Workers* v. *Deena Artware, Inc.* (1952, CA 6), 198 F. 2d 637, cert. den. 344 U. S. 897, 97 L.ed. 694, 73 S. Ct. 277; *Walters* v. *International Assoc. of Plumbers & Steamfitters* (1963,

CA 6), 323 F. 2d 578. These neutral construction workers certainly could be performing work "essential to the continued operation of the primary employer's business," yet no one would argue that such employees should be put in the same category with those performing conventional maintenance work, as in *General Electric*, or with railroad switchmen furnishing day-to-day service for the primary employer, as in *Steelworkers*.

In the *Steelworkers* case this Court agreed with the dissent of Judge Lumbard in the Second Circuit and quoted with approval the following language from the dissenting opinion:

> "In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own *delivery entrances* might have accomplished. Because the fence surrounding the railroad's right-of-way was a continuation of the fence surrounding the Carrier plant, there was no other place where the Union could have brought home to the railroad workers *servicing Carrier* its dispute with Carrier."

The picketing and other activities engaged in by Respondent Union in this case were directed not at "employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations" but at Petitioner's customers attempting to enter the premises of Petitioner to purchase sand and gravel products from Petitioner. It is clear that Union activity aimed at secondary employees, such as delivery men, performing services in furtherance of the primary employer's normal operations is quite dif-

ferent from activity aimed at customers of the primary employer attempting to purchase products for their own use.

General Electric is not in conflict with Petitioner's position. Mr. Justice White, in the *Steelworkers* opinion, regarded the result reached in *General Electric* to largely govern the *Steelworkers* decision. 376 U. S. 496. The *General Electric* case involved picketing by a Union engaged in a strike against the primary employer, of a separate gate on the primary employer's premises, marked and set aside for employees of independent contractors performing a variety of tasks, such as: (1) construction work on new building; (2) installation and repairing of ventilating and heating equipment; (3) retooling and rearranging operations; and (4) general maintenance work. 366 U. S. 669. After surveying the course of Board and Court decisions construing the provisions of Section 8 (b) (4), Mr. Justice Frankfurter concluded that "If a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U. S. 681. The *Bedford-Nugent* case differs on the *key question*. Here, the coercion was directed against *customers* who desired to purchase the primary employer's products for *their own use*. The *General Electric* case was remanded to the Board for a determination as to the extent to which the separate gate was used "by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric." 366 U. S. 682.

In his opinion in the *General Electric* case, Mr. Justice Frankfurter quoted the following language from an Analysis of the proposed 1959 amendments to 8 (b) (4) (A) pre-

pared by Senator Kennedy and Representative Thompson, contained in 105 Cong. Rec. 16589, 366 U. S. 681:

> "The proviso was directed against the fear that the removal of 'concerted' from the Statute might be interpreted so that 'the picketing at the factory violates Section 8 (b) (4) (A) because the pickets induce the truckdrivers employed by the trucker not to perform their usual services, where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike'."

The above quoted legislative history of the 1959 amendments states that the proviso was intended to prevent picketing of *delivery men* at the primary premises from being construed as violative of Section 8 (b) (4) (A). Of course, delivery men do perform essential services in furtherance of the primary employer's normal business operations; however, such services are quite different from attempts by customers to do business with the primary employer.

The Decisive Factor in a Determination of Whether Picketing and Other Activity Violates Section 8(b)(4) Is Not the Location But Whether an Object of the Activity Is to Produce an Illegal Effect.

The lower court found the Union activity to be protected *only* because it took place at Petitioner's premises. After summarizing the pertinent facts of the case, the following comment was made:

> "It is apparent from the Court's factual findings that this case involves only picketing and activities at the premises of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises." Appendix A, pages 21-22.

In a series of cases decided during the past fifteen years, this Court has departed from the Board's earlier position, enunciated in *United Electrical Workers* (Ryan Construction Corp.), 85 NLRB 417, that any picketing around the situs of a primary employer is excluded from the provisions of Section 8 (b) (4).

In *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, this Court based its decision, *not solely upon the location of the picketing* but upon the lack of "concerted activity."

> *"The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive.* The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by Section 8 (b) (4). Insofar as the Union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the Union sought concerted conduct by such other employees." 341 U. S. 671.

The rationale of the *Rice Milling* case did not survive the 1959 amendments, which eliminated the requirement for "concerted" action under Section 8 (b) (4). Nevertheless, the basic approach to the case had a definite effect upon subsequent construction of the Statute. The location of picketing at the primary situs no longer constituted an exemption from the operation of Section 8 (b) (4). The intent or object of the Union activity became the primary test of its legality when neutrals were encouraged, threatened or coerced to cease doing business with the primary employer.

Three other cases decided by the Court on the same day as the *Rice Milling* case solidified the concept of "intent" or "object" as the principal criterion for finding an 8 (b) (4) violation. In *NLRB* v. *Denver Building and Construc-*

tion Trades Council, 341 U. S. 675; *International Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U. S. 694; and *Local 74, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 341 U. S. 707, the Court approved the Board's findings of Section 8 (b) (4) (A) violations. In each of these cases, this Court found 8 (b) (4) violations, notwithstanding that *all* activity was at the primary premises.

In the *Denver* case, the Court stated, at page 685,

> "We now reach the merits. They require a study of the *objectives* of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in Section 8 (b) (4) (A)."

Again it was stated by the Court, at page 687,

> "We must first determine whether the strike in this case had a proscribed *object*."

The *Rice Milling* case was distinguished on the ground that "it (the Union) did not encourage concerted action by the customer's employees to force the customer to boycott the mill." The clear inference is that a violation of Section 8(b)(4)(A) would have been found in *Rice Milling* if the union had encouraged "concerted" action by the customers of the mill to cease dealing with the mill.

Mr. Justice White in the *Steelworkers* opinion apparently recognized the proposition that the location of picketing activity is not the decisive factor when he said:

> "The location of the picketing is an important but not decisive factor, ..." 376 U. S. 499.

In *Local 20, Teamsters, Chauffeurs & Helpers Union, etc.* v. *Lester Morton* (1964), 377 U. S. 252, the inducement of customers to cease doing business with the primary employer was held to be violative of Section 303. The Court of Appeals in the case at bar held the *Morton* case to be inapplicable because the contacts were made by the

Union representatives with the O'Connel employees at sites away from the primary picket line. Appendix A, page 24. To quote the Seventh Circuit in regard to the Union activity in the *Morton* case:

> "Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the Morton case." Appendix A, page 24.

Although the District Court opinion in the *Morton* case does mention the "away from the primary situs" facts, 200 F. Supp. 659, nothing in the opinion indicates that the location of the activities was considered to be decisive. Likewise, these facts were not relied upon by the Court of Appeals in the *Morton* case. 320 F. 2d 505. This Court did not even mention these so called "controlling" facts when affirming the award of damages based upon the O'Connel incidents. 377 U. S. 252. The basis for this Court's reversal of the *Morton* judgment, insofar as it pertained to Union contacts with Launder & Son, Inc., another of the plaintiff's customers, is distinguishable because such contacts were with Launder management and not its employees. At the time that the activities complained of in *Morton* occurred, Section 303(a) proscribed only inducement or encouragement of "the employees of any employer." This limitation of the Act's provisions to employees only was changed by the 1959 amendments which added subsection (ii) to Section 8(b)(4) "to threaten, coerce or restrain *any person* engaged in commerce or in an industry affecting commerce," where the object of such action is proscribed by subsection (B).

Thus, nothing contained in either the District Court, Court of Appeals or Supreme Court opinions in the *Morton* case is indicative of the location of the picketing being regarded as decisive.

For other cases holding the object or intent of Union picketing or other activity aimed at secondary employees to be the prime factor in determining whether such activity is proscribed by Section 8(b)(4) see: *United Brick and Clay Workers of America, et al.* v. *Deena Artware, Inc.* (CA5 1952), 198 F. 2d 637; *Construction and General Laborers Local Union No. 438, AFL-CIO* v. *Hardy Engineering and Construction Company, Inc.* (CA5 1965), 354 F. 2d 24; and *Superior Derrick Corp.* v. *NLRB* (CA5 1960), 273 F. 2d 891, 896, cert. den. 364 U. S. 816.

To recapitulate, Petitioner asserts that the District Court and the Court of Appeals have misapplied and overextended the holdings of the *Steelworkers* and *General Electric* cases to the facts of this case. If the decision in this case is allowed to stand, a labor organization may, with impunity and practically without limitation, insofar as Federal labor law is concerned, threaten, coerce and restrain customers of a primary employer for the object of forcing such customers to cease doing business with the primary employer, so long as the Union activity is confined to the premises of the primary employer.

CONCLUSION.

For the foregoing reasons Petitioner respectfully asks that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

September Term, 1965—January Session, 1966

No. 15352

BEDFORD-NUGENT CORPORATION, an Indiana corporation,
Plaintiff-Appellant.

vs.

CHAUFFEURS, TEAMSTERS and HELPERS, LOCAL UNION No. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana.

March 3, 1966.

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* Bedford-Nugent Corporation, plaintiff-appellant, brought this action in the District Court under the provisions of Section 303 of the National Labor Relations Act, as amended (29 U. S. C. A. § 187), to recover compensatory damages from the defendant-appellee Union[1]

1. Chauffeurs, Teamsters and Helpers, Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The damages are alleged to have been occasioned by activity of the Union charged to be an unfair labor practice under the provisions of Section 8 (b) (4) of the Act (29 U. S. C. A. § 158 (b) (4)).[2] The cause was tried to the court without a jury. The court made and entered findings of fact and conclusions of law. On the basis of the facts found the court concluded that although the activity of the Union clearly fell within clauses (i) and (ii) of Section 8 (b) (4) it was excluded from the unfair labor practices defined by that section because it was within the protected area of primary picketing carved out in the proviso to subsection (B) of Section 8(b) (4). The court regarded *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, as dictating such conclusion. A judgment order dismissing the action was entered and the plaintiff appealed.

---

2. Insofar as here pertinent Section 8(b)(4) provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

The factual findings of the District Court are not challenged. Insofar as they are pertinent to the issue presented on appeal they may be summarized as follows. Plaintiff is engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Its operations are conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Union, which was not the certified bargaining representative of plaintiff's employees, picketed the plaintiff's premises at each of the three locations during the period of September 26, 1961, through November 7, 1961, and some of plaintiff's employees who were members of the Union joined in the picketing. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included the placing of nails and tacks at the entranceways of plaintiff's premises, the shooting of an air pistol at the radiators and windshields of vehicles of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical injury and property damage to customers who attempted to enter or did enter plaintiff's premises. Although the Union's activities did not stop all customers from entering plaintiff's premises, it did have the effect of deterring a substantial number. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle plaintiff's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of the activities was to force such customers to cease doing business with plaintiff and to force plaintiff to recognize the Union as the representative of plaintiff's employees.

It is apparent from the court's factual findings that this case involves only picketing and activities at the premises

of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises.

Section 303 makes activity or conduct of a labor organization which is "defined as an unfair labor practice" by Section 8(b) (4) unlawful for the purpose of authorizing suit for damages in a United States district court against the labor organization by a person injured in his business or property by reason of such unfair labor practice.

The contested issue presented for our determination is whether the District Court erred in concluding that the activity and conduct of the Union did not constitute an unfair labor practice as defined in Section 8(b) (4).

Plaintiff contends in substance that because the picketing and accompanying activities here involved were directed in part at customers and employees of customers seeking entrance to the plaintiff's premises the Union's conduct is a secondary activity proscribed as an unfair labor practice and therefore unaffected by the proviso to subsection (B) of Section 8(b) (4). In this connection it is urged that *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton, d/b/a Lester Morton Trucking Co.*, 377 U. S. 252 is apposite and that *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, is distinguishable on the ground that the picketing held to be within the protected area of primary activity in *Steelworkers* was aimed at secondary employees who furnished day-to-day services essential to the primary employer's regular operations, rather than at employees of customers as in the instant case.

But an analysis of those two decisions in the light of the background and rationale furnished by *Local 761, International Union of Electrical, Radio & Machine Workers,*

AFL-CIO v. *National Labor Relations Board*, 366 U. S. 667 (the General Electric case), in which the Court took occasion to survey the cases dealing with picketing at both primary and secondary sites, convinces us that it is *Steelworks* which is controlling here and that *Morton* is distinguishable.

In *Steelworkers* it is stated (376 U. S. 492, 498-499):

> "We think *General Electric's* construction of the proviso to §8(b) (4) (B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations."

We think it obvious that customers and employees of customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission "contributing to the operations" of the primary employer. Customers are essential to the continued operation of the plaintiff's business. To deter them from entering the plaintiff's premises is certainly an application of economic pressure at the primary situs. We agree with the District Court that *Steelworkers* is dispositive of the issue here presented. Both the situs and the object of the picketing were primary and therefore the Union's con-

duct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b) (4).

Plaintiff's reliance on *Morton* is misplaced. The facts there involved, as disclosed in the District Court's opinion (200 F. Supp. 653, 659 and 660), reveal that contacts were made by the union representatives with the employees of O'Connel Coal Company, a customer of the primary employer, not at the latter's premises but at sites away from the primary picket line. Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case.

In concluding we note that in *Steelworkers* it was recognized (376 U. S. 492, 501-502) that primary picketing, excluded by the proviso to subsection (B) of Section 8(b) (4) from activity defined as an unfair labor practice, does not become illegal secondary activity because it is accompanied by threats and violence. The Court pointed out that the legality of violent picketing, if "primary", must be determined under other sections of the statute or under state law. And, the Court construed the proviso to §8(b) (4) as saving from the proscription of that section primary picketing which, as is in the case of the use of violence or other unlawful conduct, is forbidden by some other law. In this connection the Court reasoned (376 U. S. 492, 501-502):

> "Such picketing does not become illegal secondary activity when violence is involved but only when it interferes with business intercourse not connected with the ordinary operations of the employer. This is not to say, of course, that violent primary picketing is in all respects legal but only that it is not forbidden by §8(b) (4); it would escape neither the provisions of the federal law nor the local law if violative thereof.
>
> This is all, we think, that was intended by the proviso to §8(b) (4) which provides that nothing in sub-

> section (B) 'shall be construed to make unlawful, *where not otherwise unlawful*, any primary strike or primary picketing.' (Emphasis supplied.) It is possible to read this language to mean that the proviso does not save from proscription under §8(b) (4) union activity violative of other laws, but this interpretation would condemn as secondary conduct any and all picketing directed toward neutral employers so long as the conduct, as in the case of violence, was forbidden by some other law. In our view, the words 'where not otherwise unlawful' were inserted only to make clear that the proviso, while excluding the conduct from the §8(b) (4) sanctions did not also legalize it under other laws, state or federal. The legality of violent picketing, if 'primary,' must be determined under other sections of the statute or under state law."

Accordingly, redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than §303 which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices.

The judgment order of the District Court is affirmed.

AFFIRMED.

No. 15352

SCHNACKENBERG, *Circuit Judge*, dissenting.

There is no dispute that the union placed nails and tacks at the entranceways to plaintiff's premises, shot an air pistol at the radiators and windshields of vehicles of approaching customers, blocked entranceways and refused to stand aside, and threatened physical injury and property damage to customers who attempted to enter or did enter plaintiff's premises. But the union seeks to avoid respon-

sibility for its acts by asserting that it falls within the proviso in §8(b) (4) (B).

> * * * *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

It should be emphasized, however, that the act states that primary picketing is not to be made unlawful "*where not otherwise unlawful.*" (Emphasis added.) Here, the union's acts involved interference with customers and their property and constituted, according to the laws of the states, trespass, assault and malicious mischief. Thus, the union's acts were unlawful but they were not made unlawful by clause (B). Neither can they be made lawful by said clause. *Steelworkers,* cited by Judge Castle, recognized this in effect when, at pages 501-502, the court said:

> "* * * This is not to say, of course, that violent primary picketing is in all respects legal but only that it is not forbidden by § 8(b)(4); it would escape neither the provisions of the federal law nor the local law if violative thereof."

Where the record indicates that the acts were unlawful, the union had the burden of proving their lawfulness. This it did not do; it made no attempt to do so.

It is clear that the proviso in clause (B) did not exculpate the union from the effect of its unlawful primary picketing in this case.

I would reverse the order of the district court.

APPENDIX B.

JUDGMENT.

The Court having submitted its Findings of Fact and Conclusions of Law it is hereby Ordered, Adjudged and Decreed that plaintiff take nothing under its complaint and plaintiff's cause of action is hereby dismissed with costs assessed in favor of defendant in the amount of $.....

Dated this 7th day of July, 1965.

CALE J. HOLDER,
Judge, United States District Court Southern District of Indiana.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above captioned cause came before the Court for trial without a jury and both parties having offered evidence, having rested, and having argued their respective positions, the trial was concluded. The Court having considered said evidence and arguments, does now submit its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

1. Plaintiff, Bedford-Nugent Corporation, was at all times material to this action an Indiana corporation, having its principal office and place of business in Evansville, Indiana, and was engaged principally in the business of extraction and preparation of river sand and gravel in the Ohio River Valley area for sales throughout the state and in interstate commerce. Plaintiff conducted its oper-

ations at premises in Evansville, Indiana, Rockport, Indiana, and Henderson, Kentucky, and its interstate business was sufficiently substantial so as to be characterized as an industry affecting commerce for jurisdictional purposes.

2. Defendant, Teamsters Local Union No. 215 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was at all times material to this action an unincorporated association and labor organization and its duly authorized agents and officers were engaged in representing and acting for its employee members within the Evansville Division of this Court's District.

3. Defendant, Teamsters Local Union No. 215, which was not the certified bargaining representative of plaintiff's emplyees, commenced picketing plaintiff's premises at Evansville, Indiana, Rockport, Indiana, and Henderson, Kentucky, by and through its agents on or about September 26, 1961. Said picketing was joined in by some of plaintiff's employees who were members of defendant union and continued until November 7, 1961. Defendant also picketed plaintiff's premises at two (2) subsequent periods of time but this picketing is not material since plaintiff has abandoned any claim with respect to this subsequent picketing.

4. In addition to picketing plaintiff's premises during the period of September 26, 1961 through November 7, 1961, defendant union by and through its agents also engaged in other activities at the primary sites. Said activities included the placing of nails and tacks at the entranceways to plaintiff's premises, the shooting of an air pistol at the radiators and windshields of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical

injury and property damage to customers who attempted to enter or did enter plaintiff's premises.

5. Although defendant's activities did not stop all customers from entering plaintiff's premises, it did have the effect of deterring a substantial number.

6. The activities of defendant, referred to in findings three (3) and four (4), were committed in part for the purpose of inducing customers to refuse to transport or otherwise handle plaintiff's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of said activities was to force such customers to cease doing business with plaintiff and to force plaintiff to recognize defendant as the representative of plaintiff's employees.

7. Plaintiff's sole theory of action is for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187.

Conclusions of Law.

1. This Court has jurisdiction over the parties and subject matter of this action under Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187.

2. The conduct of defendant union during the period in question at plaintiff's primary premises was reprehensible and contrary to the spirit of an orderly and peaceful approach to labor-management disputes which is the declared policy of the Labor Management Act. However, whatever the Court's general reaction to defendant's conduct may be, the Court in this instance is limited to evaluating such conduct solely in the light of plaintiff's declared theory of action. Plaintiff has founded his action solely upon Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187. This section does not provide for general relief for any activity of a labor organ-

ization which is defined as an unfair labor practice under any sub-paragraphs of Title 29 U. S. C. A. Section 158(b), but rather provides relief only for that activity declared to be an unfair labor practice under sub-paragraph (4) of Title 29 U. S. C. A. Section 158(b). Irrespective of how reprehensible this Court regards defendant's conduct and irrespective of how this Court would construe defendant's conduct under Section 158(b)(4) if this case had been one of first impression, this Court is compelled to follow the precedents of those Courts superior to this one. This Court believes the United States Supreme Court Opinion in *United Steelworkers of America* v, *National Labor Relations Board*, 376 U. S. 492, 84 S. Ct. 899 (1964) to be controlling of the questions at bar. As in the steelworkers case, the activities of defendant union in this case clearly fall within clauses (i) and (ii) of Section 158(b)(4); likewise the objective of the defendant is covered by subsection (B), exclusive of the proviso thereto. The question whether the activities of the defendant, although literally within the definition of secondary activities contained in clauses (i) and (ii) of Section 158(b)(4), are nevertheless within the protected area of primary picketing carved out in the proviso to subsection (B) was decided by the Supreme Court in favor of labor organizations. The Court also indicated that even if such activity was violent, such would not be a violation of Section 158(b)(4). Thus, the Court finds that whether or not defendant may have violated some other federal or state law, defendant did not commit an unfair labor practice as defined in Title 29 U. S. C. A. Section 158(b)(4).

Dated this 7th day of July, 1965.

CALE J. HOLDER,
Judge, United States District Court Southern District of Indiana.